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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

No. 664

October Term, 1950.

FRED MONEY,

Petitioner,

v.

CAPTAIN H. N. WALLIN, COMMANDER EDWIN H. SCHANTZ, CHARLES D. HERTZOG,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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FRED MONEY, petitioner, prays that a writ of certiorari may issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on January 10, 1951.

OPINIONS BELOW.

The opinions of the United States District Court for the Eastern District of Pennsylvania are reported in 88 F. Sup. 980 and 89 F. Sup. 932. The opinion of the Circuit Court of Appeals for the Third Circuit is reported in 186 F. 2d 411.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on January 10, 1951. The jurisdiction of this court is invoked under 28 U. S. C. Sec. 1251 (1).

QUESTION PRESENTED.

May a regulation by the executive branch of government deprive some classes of civil servants of an available judicial review for an infringement of their civil service statutory rights?

STATUTES INVOLVED.

The Civil Service Act of 1912, 37 Stat. 555, (5 U.S.C.A. 652), grants civil servants permanent tenure, save for cause, and grants civil servants the unqualified right to be furnished a copy of preferred charges for cause with reasonable opportunity to submit an answer accompanied by supporting affidavits.

STATEMENT OF THE CASE.

Petitioner was regularly employed in the Philadelphia Naval Base as a classified civil servant of the United States (19a). His civil service classification was master mechanic (20a).

On February 1st, 1944, the Commandant of the Philadelphia Naval Base preferred written charges against petitioner and forbade him from re-entering the Base (42a). On February 5th, 1944, the Commandant sent a memorandum to the Secretary of Navy recommending petitioner "be discharged" (44a).

That memorandum based the recommendation on the charges which alleged petitioner "in or near National Park, New Jersey," * * * (petitioner's town of residence) * * * "over a period of years * * * had abnormal sexual relations with * * * girls in their teens. * * *"(43a). The Commandant's memorandum made no attempt to clarify that vague charge (43a-44a).

On April 28, 1944, petitioner received a communication from the office of the Secretary of the Navy (29a, 46a). That communication dated April 18, 1944, announced petitioner's "removal" (46a).

Upon receipt of the Commandant's charges and continuing thereafter, petitioner sought a clarification of the charges so that he might submit an answer accompanied by affidavits (68a-70a). Petitioner simultaneously sought additional time in which to prepare such an answer and to obtain accompanying affidavits (71a). Petitioner was granted neither clarification nor time (71a).

Petitioner, nevertheless, persisted in his belief that the indefiniteness of the Commandant's charge, coupled with the brief reply period, effectively deprived him of his statutory right to submit an answer accompanied by affidavits.

Petitioner therefore continued to seek relief by an exhaustion of his administrative rights to review (29a). Petitioner thereafter commenced a civil action in the District Court for the Eastern District of Pennsylvania to obtain judicial relief from the infringement of his statutory civil service rights (4a).

The civil action does not seek a judicial review of the truth of the charges.

The civil action seeks a judicial determination that the Commandant's actions deprived petitioner of his statutory right to submit an answer accompanied by affidavits and that such deprivation was in violation of the explicit provisions of the Civil Service Act (supra). (4a-11a.)

The Complaint named the Commandant as a defendant (4a). He was duly served (19a). The Secretary of the Navy was not named as a defendant or thereafter joined as a defendant.

The District Court dismissed petitioner's action (85a-89a). The Court of Appeals affirmed, on the single ground that the Secretary of Navy was an indispensable party and therefore the Local District lacked jurisdiction (93-95).

The Court of Appeals, in so affirming, relied upon a regulation promulgated by the Secretary of Navy for governing the employment of civilian personnel in the field service of the Navy Department (94). That regulation specified the Secretary of Navy to be the person to take final

action for termination of the employment of employer of petitioner's civil service grade classification (47a).

There is no evidence that the Secretary of Navy directed petitioner's work or that the Secretary of Navy had any personal knowledge of petitioner, or his work, or his conduct. The only evidence as to the Secretary of Navy's knowledge of the petitioner, is the issuance of the order of "removal" and the prior transmission of the Commandant's recommendation of removal.

The Court of Appeals' opinion, however, stated that this regulation constituted the Secretary of Navy an indispensable party to petitioner's civil action (94). It reasoned that success of petitioner's civil action would challenge and conflict with the Secretary of Navy's order of "removal" hence conflict with the Navy regulation in question (95).

The judgment of the Court of Appeals thus prohibits petitioner, and all of his classification grade, from judicial relief in any court save that of the District of Columbia. Civil servants in lower grade classification are not so deprived of the opportunity to seek judicial relief in their available local Federal court.

Petitioner, however, continues his belief that his statutory rights are secure from impairment by or amputation by an administrative order. Petitioner further continues his belief that deprivation of the opportunity to seek relief in an available court is an impairment or amputation of his civil service statutory rights. For like reasons it effects an impairment or amputation of the civil service statutory rights of all other in petitioner's grade classification.

Hence petitioner files this petition.

REASONS FOR GRANTING THE WRIT.

Despite the content of the Court of Appeals' opinion the question herein raised is not the concept of the indispensable party. This Court has clarified that concept: *Williams v. Fanning,* 332 U. S. 490 (1947).

This petition questions the right of the executive branch of the government to deprive certain classes of civil servants of an otherwise available judicial remedy for relief against an infringement of a statutory right. The deprivation effectively does or may bar all opportunity for judicial relief.

Petitioner sought and was denied the right to relief in his available local court. Petitioner believes he may not be so deprived by a mere executive regulation. He was so deprived by the Secretary of the Navy's regulation.

To petitioner's subordinates is available the right to seek judicial remedy in their local Federal Court.

The Secretary of Navy's regulation permits the Commandant or others to themselves terminate the employment of civil servants in grade classifications lower than petitioners'. Hence, local Federal Courts are not deprived of jurisdiction for actions which they may bring for an infringement of their civil service statutory rights.

It has been determined by this Court that the Government, whether acting through the legislative, executive, or judicial branch, may not take away a full and adequate remedy for an infringement of a constitutional right. See *Binkerhoff-Faris Trust and Saving Company v. Hill,* 281 U. S. 673 (1930); *Truax v. Corrigan,* 257 U. S. 312 (1921). To hold the contrary, conflicts with the basic tenet of constitutional law that a constitutional right may not be destroyed by a legislative enactment.

No judicial determination by this Court prohibits an administrative order from taking away a full and adequate available remedy for an infringement of a statutory right. The judgments of the Lower Courts sanction an order of

the executive branch to nullify the enactment of the legislative branch.

Petitioner seeks this Court to determine that the executive branch may not so nullify and take away a right granted by the legislative branch.

The principle involved is not limited to the infringement of the statutory rights resulting from the Civil Service Act. The principle is equally applicable to other federal and state statutory rights.

The Lower Courts failed to recognize this principle. Their judgments and opinions are concerned with the concept and application of the indispensable party doctrine. Their judgments, however, sanction and effect an infringement of a statutory right.

The extent of the infringement is focused, if it be assumed petitioner was a resident of Guam, and there employed in a Naval Base. The Lower Courts' judgments, upon such facts, would deprive petitioner of all judicial remedy for relief save by journeying to and bringing his witness to the District Court for the District of Columbia. Civil servants likewise employed, but not encompassed by the Secretary of Navy's regulation, could obtain identical opportunity for review in the most proximate Federal Court.

The Department of Navy's regulation may give those in petitioner's classification an administrative right against termination of employment, save upon approval by the Secretary of Navy. Such administrative right is, in some respects, greater than petitioner's statutory rights to be informed of, and an opportunity to submit an answer to charges preferred.

It does not follow that the granting of such administrative right deprives petitioner of his statutory rights. Similarly it does not follow that the granting of the administrative right precludes him from available judicial remedy for relief against infringement of his statutory rights.

Petitioner's possible greater administrative rights were determined by the Commandant's letter recommending the Secretary of Navy to terminate petitioner's employment. That letter afforded petitioner no opportunity to answer the charges. The regulation causing that letter does not and should not deprive petitioner of an opportunity to seek relief in his available local court.

CONCLUSION.

For the foregoing reasons, this petition for the writ of certiorari should be granted.

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